

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
WASHINGTON CHEMICAL, INC.,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB Nos. 85-25, 85-26
85-116 and 85-117

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

THIS MATTER the appeal of Department of Ecology Orders DE 85-114 (\$5,000 civil penalty); DE 85-115; DE 85-400; and DE 85-401 (\$15,000 civil penalty) issued pursuant to the dangerous waste laws and regulation of the state of Washington came on for formal hearing before the Pollution Control Hearings Board on July 31, 1985, in Spokane, Washington.

Seated for and as the Board were Lawrence J. Faulk (presiding) and Wick Dufford. Gayle Rothrock has reviewed the record in this case.

Appellant corporation was represented by its president, Mr. Donn

1 Herron. Respondent was represented by Assistant Attorney General
2 Charles Douthwaite. The Spokane court reporting service "On the
3 Record" in the person of Samantha Gaylord recorded the proceeding.

4 Witnesses were sworn and testified. Exhibits were admitted and
5 examined. All proceedings were heard or read.

6 Having heard the testimony, having examined the exhibits, and
7 having considered the contentions of the parties, the Board makes these

8 FINDINGS OF FACT

9 I

10 Washington Chemical, Inc. is a Washington corporation with its
11 principle place of business in Spokane, Washington.

12 II

13 The appellant company is in the business of recycling and
14 distillation of used solvents and the resale of the reclaimed solvents.

15 III

16 Washington Chemical, Inc.'s inventory, i.e., the used solvents it
17 obtains and processes for resale, includes chemicals regulated as
18 "hazardous waste" under U.S. Environmental Protection Agency's
19 regulations and since 1982, regulated as "dangerous waste" and
20 "extremely hazardous waste" under the Department of Ecology's
21 regulations. The recycling business operated by Washington Chemical,
22 Inc. requires storage capacity for used solvents pending their
23 recycling.

24 IV

25 On February 25, 1983, appellant applied for a permit for the
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1 storage of solvents which is required under federal law and state
2 regulations. [See 42 U.S.C. 6925(a) and WAC 173-303-800(2)].

3 V

4 On June 30, 1984, the Department of Ecology issued a permit to the
5 appellant for the storage of dangerous waste. This permit authorized
6 operation of appellant's storage facility on East 3828 Queen Avenue in
7 Spokane. The permit subjected appellant's operation to certain
8 conditions.

9 A major condition of this permit was a compliance schedule for
10 constructing a "secondary containment facility" for its storage
11 areas. This containment facility was to consist of a secure concrete
12 pad with curbing and sumps to collect free liquids from the 55 gallon
13 steel drums in which appellant's inventory is stored.¹ Much of this
14 inventory, including "dangerous" and "extremely hazardous waste" has
15 been stored on bare earth until very recently. This permit also
16 required the appellant to install a cover over that portion of the
17 concrete pad used to store ignitable "extremely hazardous waste."

18 An existing concrete-floored warehouse on the site was being used
19 to store only non-flammable "extremely hazardous waste" and a concrete
20 curb at doorways was required for this structure.

21 VI

22 Appellant did not appeal the permit or any of its conditions, and
23
24

25 1/ Storage in these drums is referred to as "primary containment."

1 on August 7, 1984, appellant submitted the company's plans for the
2 containment facility to the Department of Ecology for approval. The
3 plans submitted were prepared by an architect as a prototype for the
4 kind of facilities required and were not specifically designed to fit
5 the Queen Avenue site.

6 VII

7 On September 7, 1984, the Department of Ecology conditionally
8 approved the plans and specifications as submitted. The approval
9 letter triggered a time schedule in the permit for plan
10 implementation. According to the permit, construction of the facility
11 was to begin 30 days after approval and completion was to occur within
12 60 days after DOE approval (November 7, 1984).

13 The approval was conditioned by Department as follows:

14 Prior to construction, however, you must also
15 receive approval from the City of Spokane Building
16 Department and Fire Department. If any major
17 modifications are required to receive their
18 approval, which would affect compliance with WAC
19 173-303 and your permit, you must resubmit new
20 plans for our approval.

21

22 Nothing in this approval shall be construed as
23 satisfying other applicable federal, state or local
24 statutes, ordinances or regulations.

25 The approval letter also advised that an appeal of its terms to
26 this Board could be filed. No such appeal was made.

27 VIII

28 In late November of 1984, the Department realized that
29 construction of the containment facility had not yet been started.

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1 Since the compliance schedule had not been met, the Department became
2 concerned. Investigation revealed that appellant had not, prior to
3 the compliance schedule's end date, made significant efforts to secure
4 the construction approvals needed from local authorities. Belated
5 inquiries by appellant had produced the information that the prototype
6 design submitted to Department of Ecology would not be locally
7 approvable because the structure's proximity to the property line
8 would necessitate a fire wall not contemplated in the original plans.

9 IX

10 On November 28, 1984, appellant's president, Donn Herron, wrote a
11 letter to the Department explaining that the plans approved by the
12 Department would not meet the conditions required by the local fire
13 and building departments. He requested an alternative compliance
14 schedule, calling for commencement of construction on December 10,
15 1984, and completion within 45 working days. The Department of
16 Ecology never directly responded to this request.

17 X

18 On November 29, 1984, respondent's inspector observed appellant's
19 facilities and informed Mr. Herron that Washington Chemical, Inc. was
20 not complying with its permit and that enforcement action was likely.

21 An agency inspection of the site on December 6 confirmed that no
22 action had been taken to construct secondary containment. By letter
23 dated January 3, 1985, the Department advised appellant of the
24 deficiencies observed during the inspection.

XI

On January 18, 1985, the Department issued a Notice of Penalty Incurred and Due (DE 85-114) for \$5,000; and DE 85-115 which provided a new 60 day period to construct approved storage facilities as required by Dangerous Waste Permit No. MAD 0037991528. The 60 day period would end March 19, 1985. On February 21, 1985, both the order and penalty were appealed to the Board, becoming PCHB Nos. 85-26 and 85-25, respectively.

XII

On April 9, 1985, the Department's inspector again inspected appellant's storage facility and found that the secondary containment facility still had not been constructed. The inspector observed and photographed drums of waste stored on the ground and he also observed deteriorated drums exposed to the elements posing what he considered to be an imminent and substantial hazard to health or the environment.

XIII

On May 23, 1985, the Department concerned about the lingering materials handling and storage problem at Washington Chemical again issued an order and civil penalty. The order, DE 85-400, revoked the "batch tolling" exemption of the company. Under the Department's rules, recycling of certain wastes is exempt from the dangerous waste regulations if performed pursuant to a detailed "batch tolling" agreement involving retention of ownership of wastes by the generator and payment to the reclaimer according to the amounts of the reclaimed portion returned to the user. Such an agreement relieves a company

1 that reclaims dangerous wastes of a measure of regulation while also
2 providing financial advantages for generators, who insofar as they
3 escape regulation, also escape attendant regulatory fees relating to
4 the wastes involved. This provides an incentive to recycle and, thus,
5 there is a business reason for a recycler to be able to enter into
6 this sort of agreement.

7 The Notice of Penalty Incurred and Due, DE 85-401, levied a
8 \$15,500 fine for failure to comply with the new compliance schedule
9 which had been set forth in the order (DE 85-115) issued in January.
10 The penalty represented \$250 per day for 62 days--the time between the
11 compliance schedule construction deadline and the imposition of the
12 penalty.

13 Appellant appealed both the order and the penalty to this Board on
14 July 5, 1985. The order became PCHB No. 85-116 and the penalty PCHB
15 No. 85-117.

16 XIV

17 Appellant's president, Mr. Herron, testified that the concrete pad
18 with curbs and sump had been constructed shortly before the hearing in
19 this case (July, 1985). The concrete pad is approximately 63 feet
20 long and 17 feet wide. No cover had been built over any portion of
21 this pad, and no fire wall.

22 Mr. Herron indicated that the required doorway curbing would be
23 constructed at the existing storage warehouse by mid-August.

24 He explained that his purpose from the outset had been to try to
25 avoid having the new storage structure classified as a "building," so

1 as to avoid additional safety requirements such as sprinklers and fire
2 walls. He advanced the theory that the Department by telling him he
3 needed approval from local building and fire protection authorities
4 had added conditions impossible to comply with in the initial time
5 frame established.

6 He stated he was aware of the requirement for "secondary
7 containment" when he applied for the permit, but admitted that no
8 specific site plan for the new structure was submitted to the local
9 authorities until too late to meet the original construction
10 schedule. He did not explain the later failure to commence
11 construction of any kind until July 1985. At the hearing, he advised
12 the Department (apparently for the first time) that he might convert
13 the existing warehouse into a facility capable of safely storing all
14 "extremely hazardous waste" he handles, by the use of decking.
15 Alternatively, he said he might accept a permit modification
16 restricting his use of ignitable "extremely hazardous waste."

17 XV

18 Appellant's Queen Avenue site is located over the Spokane aquifer,
19 a major identified ground water body which serves as a primary source
20 of domestic and municipal water supply.

21 XVI

22 Any Conclusion of Law which should be deemed a Finding of Fact is
23 hereby adopted as such.

24 From these Findings of Fact come these
25

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1 CONCLUSIONS OF LAW

2 I

3 The Board has jurisdiction over the persons and subject matter of
4 this proceeding. RCW 43.21B.

5 II

6 Respondent carries the burden to prove by a preponderance of the
7 evidence, that the orders and penalties issued were legally defensible.

8 III

9 The laws of the state of Washington provide for the issuance of
10 regulatory orders and the levying of civil penalties in connection
11 with enforcement of the state's hazardous waste management program.
12 Pertinent parts of the statute are here cited:

13 RCW 70.105.080 Violations--Civil penalties--
14 Enforcement-- Procedure. (1) Every person who
15 fails to comply with any provision of this chapter
16 or of the rules adopted thereunder shall be
17 subjected to a penalty in an amount of not more
18 than ten thousand dollars per day for every such
violation. Each and every such violation shall be
a separate and distinct offense. In case of
continuing violation, every day's continuance shall
be a separate and distinct violation.

19 RCW 70.105.095 Issuance of order requiring
20 compliance. (1) Whenever on the basis of any
21 information the department determines that a person
22 has violated or is about to violate any provision
of this chapter (RCW 70.105), the department may
issue an order requiring compliance either
immediately or within a specified period of time
. . . .

23 (2) Any person who fails to take corrective
24 action as specified in a compliance order shall be
25 liable for a civil penalty of not more than ten
thousand dollars for each day of continued
non-compliance

IV

RCW 70.105.130 empowers the Department both to establish a permit system for owners or operators of facilities which treat, store or dispose of dangerous wastes and to establish standards for the safe transport, treatment, storage and disposal of dangerous wastes, as may be necessary to protect human health and the environment. See also RCW 70.105.020.

Pursuant to these powers, the agency adopted chapter 173-303 WAC in 1982 as a comprehensive set of dangerous waste regulations. Included in these regulations is the requirement for "secondary containment." WAC 173-303-630(7). Where wastes are ignitable, fire codes are explicitly made applicable. WAC 173-303-630(8).

V

General conditions for permits issued under chapter 70.105 RCW are set forth in WAC 173-303-810. Subsection (2) states:

Duty to Comply. The permittee must comply with all conditions of his permit. Any permit noncompliance constitutes a violation and is grounds for enforcement action . . .

By virtue of this provision (which is unchallenged here), the violation of a permit is made a violation of the regulations.

VI

The statute and the regulations are written in strict liability terms. Accordingly, where a time limitation for compliance is not shown itself to be unreasonable, explanations for failure to meet such a limitation are not relevant to the issue of whether a violation

1 occurred. Such explanations go only to the propriety of the sanctions
2 imposed in light of the object(s) of the law.

3 We conclude that both the original compliance schedule for
4 "secondary containment" established by appellant's permit and the
5 additional schedule for the same task set forth in the Department's
6 order of January 18, 1985 (DE 85-115) embodied a reasonable time.

7 The schedules represented a form of prosecutorial discretion as to
8 an otherwise effective substantive requirement. When they were not
9 met, the appellant was in violation of the underlying regulation on
10 "secondary containment," as well as of the terms of its permit.

11 VII

12 We conclude that the order issued to establish a new compliance
13 schedule (DE 85-115) should be sustained under RCW 70.105.095.
14 Violation of a regulation is, we think, included within the expression
15 "any provision of this chapter," as used there. Upon determining the
16 existence of a violation, the Department issued a reasonable "order
17 requiring compliance . . . within a specified period of time."

18 VIII

19 We decide, further, that the imposition of penalties (DE 85-114
20 and DE 85-401) was appropriate.

21 The penalty for failure to meet the schedule established by permit
22 resulted from a failure to comply with a "provision of this chapter or
23 of rules adopted thereunder." RCW 70.105.080. The imposition of a
24 penalty for failure to meet the new compliance schedule established by
25 compliance order was proper under both RCW 70.105.080 (violation of

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1 rules) and RCW 70.105.095 (violation of compliance order).

2 IX

3 The surrounding facts and circumstances must be examined in
4 determining the propriety of the amount of a civil penalty. Factors
5 bearing on reasonableness must be evaluated. These include:

- 6 (a) the nature of the violation;
7 (b) the prior behavior of the violator; and
8 (c) actions taken to solve the problem.

9 X

10 The violation here is a serious one. Drums of wastes, some of
11 which were "extremely hazardous," were allowed to sit on the bare
12 ground for many months in all conditions of weather, in the face of a
13 recognized pre-existing requirement for "secondary containment"--a
14 standard created in self-evident recognition of the high degree of
15 risk of storing containers of dangerous waste without taking further
16 precautions.

17 The statute defines "extremely hazardous waste" as follows:

18 . . . (A)ny dangerous waste which (a) will persist
19 in a hazardous form for several years or more at a
disposal site and which in its persistent form

20 (1) presents a significant environmental hazard and
21 may be concentrated by living organisms through a
22 food chain or may affect the genetic make-up of man
or wildlife, and

23 (11) is highly toxic to man or wildlife

24 (b) if disposed of at a disposal site in such
25 quantities as would present an extreme hazard to
man or the environment. RCW 70.105.010(6).

Apparently no harm resulted in this instance. But the risk remained high during the entire period of non-compliance. The lack of harm is attributable to good fortune, not to absence of significant danger to public health and the environment. In enacting chapter 70.105 RCW and providing substantial penalties for its violation, the Legislature sent a message that taking such chances is unacceptable.

XI

Appellant company and the Department have a history of conflict, but prior controversies have been settled amicably. In the present matter, however, not only was no settlement reached, but an escalating series of enforcement actions were taken before any progress was shown toward solving the problem. Appellant offered no persuasive justification for its delay. Appellant's president is a highly educated man with many years in the business. It defies credulity to think that he did not know he would have to comply with local fire and building codes until the Department so advised him.

XII

The objects of the civil penalty are changing behavior in the specific case and securing compliance with the law generally. Weighing the seriousness of the offense, the behavior of the violator and the objectives of general as well as specific deterrence, we conclude that the penalties should be affirmed. However, a portion of the second penalty imposed should be suspended, in light of what appears to be appellant's eventual decision to comply.

XIII

The revocation of appellant's "batch tolling" exemption (DE 85-400) is another matter. Such an exemption is not a part of current federal regulations and the Department may, in time, be obliged to eliminate it also from the state scheme.

At the times in question, though, the state exemption was in effect. Its revocation is governed by WAC 173-303-017(3) which reads:

Any recycling process listed in subsection (2) of this section is not exempt if the department determines, on a case-by-case basis, that:

(a) The solid waste used in the recycling process is being accumulated without sufficient amounts being recycled...;

(b) The solid waste used in the recycling process, or the recycling process itself, poses a threat to public health or the environment; or

(c) The recycling process constitutes disposal and results in directly releasing the solid waste to the environment.

No evidence supports the termination of exemption here on the basis of subsections (a) and (c) above. But, we conclude that the failure to provide "secondary containment," given the nature of the waste and the site of its storage, violated subsection (b) and that, therefore, the Department's order revoking the "batch tolling" exemption was valid.

Nonetheless, we note that this is a harsh sanction involving adverse economic impact on appellant's recycling business, a type of enterprise which the overall solid waste management program encourages. Therefore, we think it inappropriate to continue such sanction beyond the direct objective of securing compliance with a

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1 particular requirement.

2 XIV

3 Any Finding of Fact which is deemed a Conclusion of Law is hereby
4 adopted as such.

5 From these Conclusions of Law the Board enters this
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ORDER

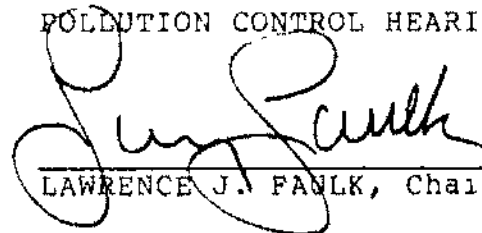
1. DE 85-114 and DE 85-115 are affirmed.


2. DE 85-401 is affirmed, provided that \$5,000 of the penalty is suspended on condition that appellant have no further violations of chapter 70.105 RCW or its implementing regulations for a period of two years from the date of this Order.

3. DE 85-400 is affirmed provided that the revocation of appellant's "batch tolling" exemption shall be effective only until appellant demonstrates compliance with the "secondary containment" requirement of its permit. When such compliance is shown, DE 85-400 shall be of no further effect, and unless the Department's rules have been amended to delete such exemptions, appellant's "batch tolling" exemption shall then be reinstated.

DONE this 23rd day of September, 1985.

POLLUTION CONTROL HEARINGS BOARD

 9/20/85
LAWRENCE J. FAULK, Chairman


WICK DUFFORD, Lawyer Member


GAYLE ROTHROCK, Vice Chairman